# SUPREME COURT OF THE UNITED STATES.

## No. ~~107.~~ 20.

JAMES McCUTCHEN ET AL., APPELLANTS,

VERSUS

JAMES MARSHALL ET AL.

ON APPEAL FROM CIRCUIT COURT U. S. FOR THE DISTRICT OF WEST TENNESSEE.

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WEST TENNESSEE, C. C. U. S.

At a circuit court of the United States, begun and held at Nashville, and for the district of West Tennessee, on the fifth day of October, in the year of our Lord one thousand eight hundred and thirty-one, and of the independence of the United States the fifty-sixth, before the honorable JOHN McLEAN, Associate Justice of the Supreme Court of the United States.

IN CHANCERY.

James McCutchen, John McCutchen, John Hutchinson, and Jane his wife, Hugh McCutchen, William McKutchen, John McNutt, Robert Bell, and Grizzy his wife, of James, Samuel, Jonathan, and John Berry, Lenny Hatton, and Polly his wife, James Maxwell, and Grizzy his wife, John Steele, and Prudence his wife, Sarah Williams, and Joseph her husband, *complainants*,

*vs.*

James Marshall, Joseph Dean, and Margaret his wife, James McCutchen, Robert, James, Samuel, William, Washington, and Patrick McCutchen, and William Caldwell, and Polly his wife, *defendants*.

Be it remembered, that, heretofore, to wit, on the 26th day of November, James McCutchen and others filed their bill of complaint in this court as follows, to wit:

*To the honorable the Circuit Court of the United States for the district of West Tennessee.*

The bill of complaint of James McCutchen, John McCutchen, John Hutchinson, and Jane his wife, who are citizens of the State of Missouri; of Hugh McCutchen and William McCutchen, who are citizens of the State of Kentucky; of John McNutt, who is a citizen of the State of Ohio; of Robert Bell, and Grizzy his wife, who are citizens of the State of Mississippi; of James, Samuel, Jonathan, and John Berry, Lenny Hatton, and Polly his wife, James Maxwell, and Grizzy his wife, John Steele, and Prudence his wife, Sarah Williams, and Joseph her husband, citizens of the State of Missouri, complainants, against James Marshall Joseph Dean, and Margaret his wife, James McCutchen, Robert, James, Samuel, William, Washington, and Patrick McCutchen, and William Caldwell, and Polly his wife, citizens of the State of Tennessee, defendants.

Humbly complaining, showeth unto your honors, your orators aforesaid, that some time in the year 1812, one Patrick McCutchen, at that time, and for many years before, a citizen of Williamson county, in the State of Tennessee, departed this life. Previous to his death, the said Patrick McCutchen made and published his last will and testament, which was after his death proven before the court of pleas and quarter sessions of said county of Williamson, and established and admitted to record in said county as his last will and testament. A copy of said last will and testament is hereto annexed, and prayed to be taken as a part of this bill of complaint. The whole of the persons nominated in said will as executor and executrix, qualified as such, and took upon themselves the burthen of executing the same. Of the said executors, both the said Samuel McCutchen and the said Hannah McCutchen are dead, leaving the said James Marshall the sole surviving executor of said will. The said Patrick McCutchen, the testator, departed this life without issue; and the said Hannah McCutchen, the widow of the said Patrick, although she intermarried after the death of the said Patrick with one James Price, also died without issue. By the provisions of said will, your honors will perceive that the said Hannah McCutchen, the widow of the said Patrick, only held under it a life estate in such portion of the property of the said Patrick as was therein devised and bequeathed to her, which estate has, consequently, terminated by her death. Your orators charge that they, together with the defendants to this bill, (except the defendant James Marshall,) are the legal heirs and distributees of the said Patrick McCutchen, deceased.

Your orators, James McCutchen, John McCutchen, Jane Hutchinson, who intermarried with complainant John Hutchinson, Grizzy McCutchen, who intermarried with Robert Bell, and the defendant Margaret Dean, are the children and heirs of John McCutchen, a brother of the said Patrick McCutchen, deceased. Your orator John McNutt is the only child and heir of Sarah McNutt, a sister of the said Patrick McCutchen, deceased. Your orators, James, Samuel, Jonathan and John Berry, and Lenny Hatton, and Grizzy Maxwell, formerly Lenny and Grizzy Berry, Prudence Steele and Sarah Williams, formerly Prudence and Sarah Berry, are the children and heirs of Elizabeth Berry, also a sister of said Patrick, deceased. The said Patrick also left as his distributees and heirs at law defendant James McCutchen, a brother of said Patrick and Alexander, and Will. Buchanan, children of a deceased sister of said Patrick, but who resides

without the jurisdiction of this court, and now, therefore, not made parties to this bill of complaint; and the remainder of the defendants (except James Marshall,) are the children and heirs at law of Samuel McCutchen, a brother also of said Patrick, deceased.

Your orators charge that the said Patrick McCutchen, was the owner of all the slaves mentioned in his said will, which said slaves, with their increase, are liable to be distributed to your orators and said defendants, (Marshall excepted,) as his legal representatives. But the said James Marshall refuses to distribute said slaves, or any of them, and denies that they or any part of the estate of the said Patrick, deceased, by him to be distributed, pretending that, by the terms of said Patrick McCutchen's will, he is directed at the times therein specified to set them free; and in fact said Marshall did present a petition to the county court of Williamson county, praying said county court to set free a certain number of said slaves, to wit: Jack, Ben, Thomas, Eliza, and Cynthia, and said court, erroneously supposing they had the power to do so, granted the prayer of said petitioner, and declared them free; which proceeding your orators and oratrixes charge is *coram non judice* and void, as said court had no authority or power by the laws of this State to free said negroes, unless said Patrick, deceased, had in his lifetime presented a petition for that purpose.

Your orators further charge, that, by the laws of this State, as they are advised, slaves cannot be set free by last will and testament, or by any direction, therein; and that, consequently, all of said slaves, with their increase, are liable to be distributed to the legal representatives of said Patrick, deceased.

Your orators also charge, that if the law authorized a testator to direct his slaves to be set free by a given period, or at their arriving at a particular age as was done by the said Patrick, which will more fully appear by a reference to his said will; yet, that they are still slaves until that period arrives, and that all their increase born after the death of said McCutchen, but before they were actually set free, are slaves, and, as such, liable to be distributed.

Your orators charge that Pleasant, King, Harvey, White, Nancy, Sam, Rainy, Ferris, Rose, Polly, and Caroline, the children of Cynthia and Eliza, (or perhaps Rose,) were all born after the death of said Patrick; and before the time arrived when, by the directions in said will, were to be set free, are consequently said last mentioned, (if no others) are to be distributed to said Patrick's representatives.

Your orators also charge that there is no other property to be distributed except the hire of said slaves, nor are there any debts outstanding against the estate of said Patrick as they are advised and believe. Your orators require said James Marshall to state for what sums he has hired said slaves, and how much money is now in his hands as executor of the said Patrick, deceased.

Your orators being remedyless by the strict rules of the common law, and only relievable in a court of equity, pray that said James Marshall, Joseph Dean, and Margaret his wife, James McCutchen, Robert, James, William, Samuel, Washington, Patrick, and William Caldwell, and Polly his wife, may be made defendants to this bill of complaint, and true, direct, and perfect answer make upon their corporeal oaths, to all and singular the charges before mentioned; and your orators pray that, by a decree of your honorable court, the said James Marshall may be compelled to distribute said slaves to your orators, and account for the hire of said slaves in the pro-

portions to which they are entitled, or that commissioners may be appointed to apportion and distribute said slaves in equal proportions, &c. And your orators further pray, that the said James Marshall may be enjoined from prosecuting under said will, and to establish the freedom of said slaves, and that he also be enjoined from carrying said slaves out of the jurisdiction of your honorable court, and for such other and further relief as the nature of his case may require.

May it please your honors to grant to your orators not only writs of subpœna, directed, &c , commanding, &c.; but also writs of injunction, enjoining, &c.; and as in duty bound they will ever pray, &c.

In the name of God, amen, I, Patrick McCutchen, of Williamson county, and State of Tennessee, having all the faculties of my mind in their usual vigor, and preparing for that event which is the common lot of all human beings, in order that no disputes may arise about what it has pleased the Almighty to grant to my industry, and in order to make such a disposition of all my worldly affairs as shall be most consistent with my feelings, do make and ordain this my last will and testament, hereby revoking all others heretofore made.

In the first place, it is my will and desire that my executors hereafter named shall pay all my just debts with the greatest punctuality, as I have hitherto endeavored to do myself, that no one can tax me with injustice.

Secondly: I will and bequeath to my brother James McCutchen, to my brother Samuel McCutchen, to the legal heirs of my brother John McCutchen, deceased, to the legal heirs of my brother William McCutchen, deceased, to the legal heirs of my sister Sarah McNutt, deceased, to the legal heirs of my sister Elizabeth Berry, deceased, and to the legal heirs of my sister Margaret Buchanan, deceased, the several sums following, to wit: to my brother James, three dollars; to my brother Samuel, three dollars; to the heirs of my brother John, deceased, jointly, two dollars; to the heirs of my brother William, deceased, jointly, one dollar and fifty cents; to the heirs of my sister Sarah, deceased, jointly, one dollar; to the heirs of my sister Elizabeth, deceased, jointly, one dollar; and to the heirs of my sister Margaret, deceased, jointly, one dollar; to be paid by my executors when ever called for after twelve months from the time of my decease. Thirdly: I will and bequeath to my beloved wife Hannah, during her natural life, the tract of land on which I now live, with all its appurtenances, together with all the residue of my personal property of every kind, including the slaves which shall remain after the payment of my just debts mentioned in the first article, and the several legacies mentioned in the second, amounting to $12 50 cents, and a contingency which shall be hereafter mentioned, to be used as she may think proper; the slaves, nevertheless, to be subject to the arrangement to be made in a subsequent article of this testament. Fourthly: I will and bequeath to Patrick McCutchen, fourth son of my brother Samuel, all my right, interest, and claim to an undivided part of a tract of land for which Matthew Talbot gave his obligation to James McCutchen; and to which, I leave, together with the said James and Samuel McCutchen, a claim for a certain portion not now recollected, to be expended and laid out by Samuel McCutchen on the education of the said Patrick; but if the claim which is now litigating in law, should not amount to two hundred dollars, it is my will that the same shall be made equal to the sum of $ 200 out of my personal estate, which is the contingency mentioned in the third article. Fifthly: I will and bequeath to the said Patrick McCutchen, fourth son of

my brother Samuel McCutchen, and to Elizabeth Larkins, daughter of John Larkins by his first wife, Margaret, jointly and equally, the land on which I now live, with all its appurtenances, together with all the residue of my personal property, (slaves excepted,) which shall remain after the payment of my just debts, and the several legacies mentioned in the second article, and after making good the deficiency of two hundred dollars, mentioned as a contingency in the fourth article, to Patrick McCutchen, severally to take effect at the death of my beloved wife Hannah, to whom the same property is given during her natural life, as mentioned in the third article. Sixthly: it is my will and desire that my negro man slave named Jack, aged about 24 years; also my negro man slave, named Ben, aged about 19 years; also my negro woman slave, named Rose, aged about 26 years, together with what children she may hereafter have (if any) before the death of my wife Hannah; also my negro girl slave, named Eliza, aged about 11 years; also my negro girl slave, named Cynthia, aged about 7 years; also my negro boy slave, named Thomas, aged about 4 years; also my negro girl slave, named Harriet, aged about two years; also my negro girl slave, named Maria, aged about two months; the four last mentioned slaves being the children of the above named Rose, shall all and each, at the time of the death of my beloved wife Hannah, to whom they are given during her natural life, as mentioned in the third article, be liberated from slavery, and forever and entirely set free: provided, those who are not now of age or shall have not arrived at the age of 21 years at the happening of the death of my beloved wife Hannah, shall be subject to the following disposition, viz. Eliza shall be at the control and under the direction of my brother Samuel McCutchen until her arrival at the age of 21 years, and then be set free; Cynthia, Ben, Thomas, Harriet and Maria, shall be at the control and under the direction of James Marshall, my wife's brother, until they shall each, respectively, arrive at the age of 21 years; at which time, or times, they are to be each, respectively, liberated, and forever set free. Lastly: I do hereby appoint my beloved wife Hannah, my trusty and well beloved brother Samuel McCutchen, and my trusty friend James Marshall, executors of this my last will and testament. In witness whereof, I have hereunto set my hand and seal this 29th day of April, in the year of our Lord 1812.

PATRICK McCUTCHEN, [L. S.]

Signed and sealed in presence of us,

JOHN HARDEMAN,
WILL. MARSHALL.

It is my will and desire, that I do hereby make as a part of my will, and which shall be of equal validity, the following additional and explanatory article: Whereas some doubts may be entertained respecting the construction of the fifth article, and as I find, upon review of the subject, I have not expressed my meaning with sufficient perspicuity, I declare this to be my will and meaning of the said fifth article; Patrick McCutchen, named in that article, is to be joint legatee with Elizabeth Larkins, of the land only; and Elizabeth Larkins sole residuary legatee of the personal property which shall remain at the death of my wife. In witness whereof, I have hereunto set my hand and seal the day and date above written.

Witness, PATRICK McCUTCHEN, [L. S.]

JOHN HARDEMAN,
WILL. MARSHALL.

STATE OF TENNESSEE, *Williamson county, sct.*

The foregoing last will and testament was presented in open court, July session, 1812, and proven by the oaths of John Hardeman and Will. Marshall, the subscribing witnesses thereto, to be the act and deed of Patrick McCutchen, and the same was ordered to be recorded: whereupon came Hannah McCutchen, Samuel McCutchen, and James Marshall, the executrix and executors, therein named, and took the oath of executor, and received letters testimentatory.

N. P. HARDEMAN, *Clerk of Williamson County Court.*

A copy. Teste:

N. P. HARDEMAN, *Clerk.*

WASHINGTON, YERGER and FLETCHER, } *Solicitors.*

Sworn to before me this 26th November, 1830.

JOHN McNAIRY, *District Judge.*

Let a writ of injunction issue agreeably to the prayer of the foregoing bill of complaint, on his giving security to pay all costs and damages on his failure to prosecute this cause with effect.

JOHN McNAIRY, *District Judge.*

Know all men by these presents, that we, James McCutchen, Samuel Weakly, and James N. Menafee, are held and firmly bound unto James Marshall and others, in the penal sum of one thousand dollars, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, &c. jointly and severally, firmly by these presents, sealed with our seals, and dated this 26th day of November, 1830.

The condition of the above obligation is such, that, whereas the above bound James McCutchen and others have this day obtained an injunction agreeable to the prayer of this bill: Now, if the said James McCutchen and others shall prosecute said injunction with effect, or pay all costs and damages that may be awarded for failure therein, then the above obligation to be void, else to remain in full force *and* .

JAMES McCUTCHEN, [L. S.]
SAM. WEAKLY, [L S.]
JAS. N. MENAFEE. [L. S.]

And, thereupon, writs of injunction and subpœnas issued agreeable to the prior of said bill. Upon which, the Marshal made the following return: "Executed on Robert McCutchen, Washington McCutchen, Samuel McCutchen, James McCutchen, William McCutchen, William Caldwell and wife, James Marshall, and Joseph Dean and wife, and Patrick McCutchen." And on the 25th day of March, 1831, the defendant James Marshall, by attorney, comes, and files the following demurrer. to wit:

The demurrer of James Marshall, surviving executor of the last will and testament of Patrick McCutchen, deceased, one of the defendants to the bill of complaint of James McCutchen and others, filed in the circuit court of the United States for the district of West Tennessee.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in and by the said bill set forth and complained

of to be true, in manner and form as the same are therein and thereby set forth and alleged, saith he is advised by his counsel that there is no matter or thing in the said bill contained, good and sufficient in law to call this defendant in question in this honorable court for the same, but that there is good cause of demurrer thereunto; and, therefore, this defendant doth demur thereto; and, for cause of demurrer, this defendant saith that by complainants' own showing, James McCutchen, the brother of said Patrick, and Alexander and Will Buchanan, the children of a deceased sister of said Patrick, are necessary parties to said bill.

And, also, for that it is not stated in said bill, whether or not Samuel McCutchen, John McCutchen, Sarah McNutt, and Elizabeth Berry, brothers and sisters of the said Patrick, were living at the time of the death of the said Patrick; and, also, that there is no matter or thing in the said bill contained, good and sufficient in law to call this defendant into this court; because the complainants' bill (in case the allegations therein contained were true, which this defendant doth in no sort admit,) contains not any matter of equity whereon this court can ground any decree, or give the complainants any relief or assistance as against him this defendant; wherefore, and for divers other errors and imperfections in the said bill appearing, this defendant doth demur in law thereunto, and humbly demands the judgment of this honorable court, whether he shall be compelled to put in any further or other answer to this said bill; and humbly prays to be hence dismissed with costs.

FOSTER & FOGG & ANDERSON, *Solicitors.*

And at August rules, 1831, ordered that the defendants, except James Marshall, answer or demur before the next rule day. And at September rule, 1831, defendants having failed to answer or demur agreeably to rule heretofore made to complainants' bill, the bill is taken for confessed, and set for hearing ex parte. And on the day first above mentioned, the demurrer is set for argument by consent this 5th day of October, 1831.

THOS. WASHINGTON, *Solicitor for complainants.*
FAS. B FOGG, *Solicitor for defendants.*

And now, at this day, to wit, the 5th day of October, 1831, came the parties by their counsel, this cause came on to be heard upon the demurrer filed to the bill of complaint in presence of counsel upon both sides, and was agreed by counsel.

Whereupon, it appears to this court that there is no matter of equity in the complainants' bill whereon this court can grant relief to the complainants, and that the demurrer be sustained. It is, therefore, ordered, adjudged, and decreed, that the orders of ne exeat and injunction granted in this cause be dissolved, and that complainants' bill be dismissed, and that the defendant Marshall recover of complainants the costs of this suit.

On application of the complainants, by counsel, an appeal is granted them to the next Supreme Court of the United States, they having given bond and security as required by law.

The following is a copy of the appeal bond:

Know all men by these presents, that James McCutchen and James Dobbin are held and firmly bound unto James Marshall et al., in the penal sum of five hundred dollars, to which payment, well and truly to be made and done, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the 5th day of October, 1831.